***United States Court of Appeals***

***for the Second Circuit***

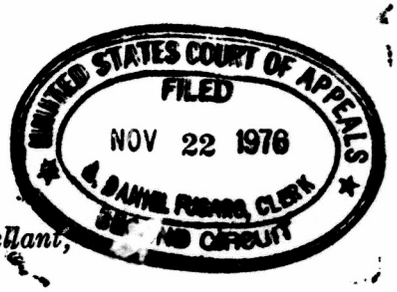

# BRIEF FOR APPELLANT

ORIGINAL

76-7430

# United States Court of Appeals

FOR THE SECOND CIRCUIT




LOCAL 771, I.A.T.S.E., AFL-CIO,

*Plaintiff-Appellee-Cross-Appellant,*

—v.—

RKO GENERAL, INC., WOR DIVISION,

*Defendant-Appellant-Cross-Appellee.*

B P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## APPELLANT'S BRIEF

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
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No. 76-7430

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-v-

RKO GENERAL, INC., WOR DIVISION,

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# APPELLANT'S BRIEF

## Issues Presented for Review

1. Whether arbitration is the exclusive remedy under the collective bargaining agreement at issue in this

case, or whether the parties have the option of submitting their grievances either to arbitration or to a court?

2. Even if the parties have the option of submitting either to arbitration or to the court, can a lawsuit be maintained with respect to the same grievance which the arbitrator has rejected?

3. Is not an order allowing such a lawsuit to proceed appealable? If not, should this Court issue a writ of mandamus in order to vindicate the national policy to settle labor disputes by arbitration?

## Statement of the Case

This is an appeal from an order of the District Court (Pollack, J.) allowing plaintiff Local 771 to maintain a court action with respect to the same contractual grievance which has been denied by an arbitrator as time-barred.

The action was commenced February 24, 1975 when plaintiff ("the Union") filed a complaint under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, to

compel arbitration of a work assignment dispute with defendant ("the Company"). The Union filed suit in spite of its ability unilaterally to commence the arbitration process under the rules of the contractually designated agency, the American Arbitration Association.

Ultimately, and after taking no steps for more than 10 months to follow the contractually mandated procedure for commencing arbitration, the Union filed a demand for arbitration with the American Arbitration Association on January 12, 1976. At that time, the Union informed the lower Court that it was submitting the dispute to arbitration, and asked the Court to retain jurisdiction "to confirm the [arbitrator's] award." On April 9, 1976, the arbitrator rejected the Union's grievance because it was not referred to arbitration within the 90-day limit in the collective bargaining agreement.

On August 24, 1976, the District Court confirmed the arbitrator's award but refused to dismiss the action. The Court held that the arbitration clause in the bargaining agreement created an "optional" rather than the exclusive

remedy for settlement of disputes. In effect, the Court allowed the Union both "options" -- submission of its grievance to the arbitrator and then again to the Court.

The Company maintains on this appeal that arbitration was the Union's exclusive remedy under federal labor law and policy and the collective bargaining agreement; and moreover, that even if arbitration was "optional," the Union cannot be allowed the double option of submitting its grievance to arbitration and to the Court.

This Court has jurisdiction of the appeal under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), and because the lower Court's order refused an injunction within the meaning of 28 U.S.C. §1292(a)(1). In the alternative, the Company seeks a writ of mandamus from this Court directing the lower Court to dismiss the case because the dispute has been conclusively determined in another forum.

## Statement of Facts

The Company, which owns and operates television station WOR-TV in New York City, is party to a collective

bargaining agreement with the Union which provides in Articles XV and XVI for the arbitration of contractual disputes (25a, 26a). Articles XV and XVI of the bargaining agreement are set out in full in the addendum to this brief. As can readily be seen, and as discussed below, there is not one word in the contract suggesting or permitting a judicial remedy.

The dispute between the Company and the Union began in February 1975 when the Company notified the Union and other labor organizations representing its employees that it had acquired two "minicam" cameras for use in its news department. The minicam, a recent technological development, is a portable electronic camera which uses videotape rather than film and facilitates the reporting of news from on-the-scene locations. The introduction of the minicam has created new and different jobs, and has substantially eliminated or reduced the need for film and film cameras traditionally used by television news departments (83a, 119a).

Each union, when informed of the Company's purchase of the minicam cameras, made contractual claims to portions of the minicam work. On February 21, 1975, the

Company assigned all of the minicam related work to employees represented by another unit of the same international union as Local 771, the union involved in this case (119a). The response of Local 771 and the remaining unions was to strike and to bring suit.

The Union filed its complaint on February 24, 1975 (107a). Originally there were two plaintiffs and two defendants. The action was discontinued two days later, on February 26, as to defendant International Alliance of Theatrical and State Employees, the Union's parent organization, which represented directly the engineering employees to whom the disputed work had been assigned (120a). The action was discontinued as to plaintiff Local 644, I.A.T.S.E. by stipulation dated March 12, 1976 (117a).*

Local 771 recognized in its amended complaint ("the

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* Unlike the bargaining agreement between the Company and the Union, the agreement between the Company and Local 644 does not contain any provision for arbitration which would have covered this dispute (109a).

complaint") that arbitration was its exclusive remedy. It did not claim the right to any substantive relief from the Court. The only cause of action asserted on behalf of Local 771 invoked the arbitration clause in the bargaining agreement (complaint ¶17, 43a) and alleged that the Court had "jurisdiction and power to order an arbitration between plaintiff Local 771 and defendant Employer...and pending such arbitration to grant appropriate affirmative or injunctive relief" (complaint ¶20, 44a, emphasis added).

The complaint contained four prayers for relief. Prayer 1 sought a declaratory judgment on behalf of Local 644 (the co-plaintiff) under its bargaining agreement which, as noted, did not contain an arbitration clause. Prayer 2 was for an order directing "arbitration of the dispute between [the remaining plaintiff] Local 771 and ... [the Company] wherein the rights and obligations of the parties may be respectively determined" (44a-45a).

Prayer 3 of the complaint was for a status quo order preventing the Company from putting its new work assignments into effect by directing the Company "to act in compliance with its agreements with plaintiffs and to refrain from acting to prejudice plaintiffs' rights herein." The Union did not at

any time attempt to effectuate this request for status quo relief. Prayer 4 was the standard request for "other and further relief," including reinstatement with back pay and damages for affected employees (45a). The request for judicial reinstatement and monetary relief of necessity must have been on behalf of the Local 644 employees, whose contract did not provide for arbitration.

In spite of the request for an order compelling arbitration, the Union had made no attempt to obtain arbitration and the Company therefore had no reason or occasion to oppose any such attempt. Section 7 of the Rules of the American Arbitration Association ("AAA"), of which the Union was of course aware (49a-51a), provides that arbitration is initiated by serving a "notice" (demand) for arbitration and by filing two copies with the Regional Office of the AAA (125a). Sections 15.02 and 16.01 of the parties' agreement incorporate the Rules of the AAA and require that arbitration be "resolved" within 90 days after occurrence of the dispute (4a). The Union did not serve or file a demand for arbitration with the AAA for more than 10 months (51a). Instead, it filed an unnecessary complaint seeking to compel arbitration which it could have commenced unilaterally simply by sending a demand to the Company and the AAA.

The members of the Union who did, and still do film editing for the Company, and members of sister unions who objected to the various other minicam work assignments, began strike activity at the same time the action was filed (88a). Because the strike constituted a classic jurisdictional dispute, on February 27, 1975 the Company filed an unfair labor practice charge with the National Labor Relations Board ("NLRB") alleging a violation of Section 8(b)(4)(D) of the Labor Management Relations Act ("LMRA")(104a). The NLRB sought a preliminary injunction against the illegal strike activity and that relief was granted by Judge Brieant on April 10, 1975 (56a). At the same time, the NLRB began hearings on the underlying work assignment dispute pursuant to §10(k) of the LMRA (79a).

On August 18, 1975, the NLRB upheld the disputed minicam work assignments made by the Company, but distinguished between two allegedly distinct aspects of the tape editing work. The Union had argued before the NLRB that the editing involved not only the actual operation of the editing machine, but the exercise of creative judgment as well. Instead of recognizing this argument as an attempt by the Union to obtain the responsibility of performing the physical editing function for its allegedly more creative members, the NLRB apparently

assumed that the Union was claiming that two separate functions existed -- mechanical and judgmental tape editing.

As the engineering employees to whom the Company had assigned the editing work claimed only the right to operate the editing machines, the NLRB assigned those duties to them, but expressly declined to rule on the appropriate assignment of the allegedly separate "judgmental" function (91a-92a, 101a). The Company maintains that there is no separate judgmental tape editing, that the necessary judgment is exercised by the news reporter, represented by another union, who was on the scene and works directly with the engineering employee who operates the editing equipment.

On January 12, 1976, almost 11 months after the minicam work was assigned, the Union finally filed an AAA demand for arbitration (51a). On the same day, the Union sent a letter to the District Court abandoning any claim for judicial relief which it might have had, and demonstrating that it had made a calculated choice to refer the dispute to final and binding arbitration. Counsel for the Union stated in his letter to the Court:

> "...[T]here would be no color of defense to a motion for summary judgment compelling arbitration.... I determined that it would be most constructive to file a demand for arbitration under the rules of the American

> Arbitration Association, the designated agency named in the contract with the employer.... I think this is a constructive and salutory [sic] solution, and I am glad to have the Court retain jurisdiction, either for the purpose of (a) the motion to stay, if the employer actually authorizes his attorney to make such a motion, or (b) motion to confirm the award if such a motion is necessary." (49a-50a)

The Company did not move to stay arbitration when it was demanded or at any other time. The AAA immediately processed the Union's demand and an arbitrator was mutually selected by the parties. On March 31, 1976, the arbitrator held a hearing at which the Union and the Company were given full opportunity to offer evidence and argument and to examine and cross-examine witnesses (35a).

The Company asserted in its answer to the arbitration demand (which was the first time a response was called for), and again at the hearing, that the dispute was time-barred under the collective bargaining agreement. As noted, §15.02 provides that "arbitration must be resolved ninety (90) days after the occurrence of the event or ninety (90) days after the Union should have had knowledge of the event" (35a).

On April 9, 1976, Arbitrator Eric Schmertz rendered his award in which he found that the dispute was barred by the explicit time limit in the bargaining agreement (35a). By motion dated May 24, 1976, the Company moved in the District

Court to confirm the arbitrator's award, and to dismiss the action, pursuant to the Federal Arbitration Act, 9 U.S.C. §§9, 13 (2a). The Union moved to vacate the award, claiming that it was "arbitrary, capricious, so far beyond the bounds of rationality as to palpably reflect partiality, and made and executed in manifest disregard of law" (58a).

The Union did not, however, suggest that it had the right to any judicial relief other than an order vacating the award. The most the Union sought was arbitration before another arbitrator (58a, 77a). The Court below, on oral argument of the motions to confirm and to vacate, suggested sua sponte that the lawsuit could proceed even though the arbitrator had rejected the Union's grievance and even though the Court was inclined to confirm his award.

In an opinion dated August 24, 1976, the lower Court granted the Company's motion to confirm the award and denied the Union's motion to vacate (113a, 139a). The Court appeared to accept the rule of United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960), that a court may not interfere with a labor arbitrator's award if the award "draws its essence from the collective bargaining agreement" (126a-127a). However the Court ruled, without citation of any authority in support of its novel position, that the Union could proceed in court with the grievance which was

rejected by the arbitrator, whose award the Court had just confirmed (131a-139a).

Section 16.01 of the bargaining agreement provides that "the parties may submit to arbitration." From this, the Court concluded that arbitration was merely an "optional" rather than the exclusive remedy, and in effect, that the Union could have the benefits of both "options" by submitting its grievance to arbitration and when not successful, by resubmitting it to the Court (133a).

The lower Court appears to have violated well-established principles of federal labor law, as well as the bargaining agreement, by allowing the Union to maintain a lawsuit when arbitration is the exclusive remedy and when the arbitrator's final and binding award which the Court confirmed, held there could be no relief. The Court has also, improperly we submit, allowed the Union to maintain a court action as to a dispute which the Union deliberately chose to submit to another forum.

The Company filed a notice of appeal on September 10, 1976 (140a). On September 22, 1976, the Union cross-appealed from the denial of its motion to vacate the arbitrator's award (141a). The Union also moved to dismiss the Company's

appeal on the ground that the lower Court's order is not appealable. On November 3, 1976, this Court referred the motion to dismiss to the panel hearing the merits.

## POINT I

## THERE IS NO LEGAL BASIS FOR THE ORDER OF THE LOWER COURT.

The lower Court's ruling that arbitration was "optional" under the bargaining agreement was patently incorrect. As shown below, arbitration was the exclusive remedy available to the parties under their collective bargaining agreement. The Court therefore had no choice but to dismiss the case. See, e.g., Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1964). The lower Court was also wrong (regardless of whether arbitration was an "exclusive" or "optional" remedy) in allowing the Union to present its grievance first to an arbitrator and then again to the Court.

### A.

### Arbitration Is The Exclusive Remedy Under The Bargaining Agreement

That arbitration was the only forum available to the Union is clear from the collective bargaining agreement itself. Sections 15.01, 15.02 of the agreement provide that the parties shall attempt to adjust all disputes involving interpretation or application of "any clause or matter covered by this contract" and "no other matters shall be subject to arbitration." Disputes shall be adjusted in meetings between

the Union Committee and Shop Management, and if that is unsuccessful, by the submission of a written grievance and further negotiations.*

If the dispute is not resolved in grievance procedures, "then either party shall have the right to refer the matter to arbitration...." (§15.02) The next provision of the agreement states that the parties "may submit to arbitration in accordance with the rules of the American Arbitration Association upon written request of either party," or "may agree to the selection of an arbitrator through other than the regular American Arbitration Association selection process." (§16.01, emphasis added) Whichever method of selecting an arbitrator is chosen, "The decision of the Arbitrator shall be binding upon both parties for the duration of this Agreement." (§16.03) With all due deference to the District Court, there is nothing in these provisions suggesting or permitting a judicial remedy.

The Union recognized the mandatory nature of the arbitration clause when protesting the Company's minicam

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* The arbitration provisions of the agreement are set out in the addendum to this brief.

work assignments. In its complaint, the Union sought only an order compelling arbitration and status quo relief pending such arbitration (45a). In its letter to the Court 10 months later, the Union announced its intention finally to submit its grievance to arbitration and urged the Court to "retain jurisdiction...to confirm the award." (50a) Even when asking the lower Court to vacate the award as arbitrary and illegal, the Union merely sought arbitration before another arbitrator (58a).

United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960), is virtually dispositive of the present case. The arbitration clause in American Mfg. Co. stated that any disputes which could not be settled by grievance procedures "may be submitted to the Board of Arbitration...." (emphasis added) The Supreme Court described that clause as "the standard form" and indicated that all disputes and grievances were arbitrable thereunder (at 565 and n.1). Although the precise holding of the case was that a particular grievance was arbitrable, the Court made it clear that under the "may" language of the contract, arbitration was the exclusive remedy for all disputes. "[T]he agreement is to submit all grievances to arbitration," Mr. Justice Douglas wrote for the Court. "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator." (at 567-568)

The Courts of Appeals, in reliance on American Mfg. Co., have specifically rejected the interpretation which the lower Court placed on the arbitration clause involved in this case. In Bonnot v. Congress of Independent Unions Local #14, 331 F.2d 355 (8th Cir. 1964), the arbitration clause provided that if the parties could not agree after grievance procedures, "then either party may request arbitration...." The Court of Appeals (per Blackmun, J.), reversing the lower Court, held that a lawsuit could not be maintained:

> "The result claimed to follow is that the arbitration here is not mandatory. We think the result is necessarily the other way. The obvious purpose of the 'may' language is to give an aggrieved party the choice between arbitration or the abandonment of its claim."
>
> (331 F.2d at 359, emphasis added)

The Fifth Circuit's decision in Deaton Truck Line, Inc. v. Local 612, Int'l Brotherhood of Teamsters, 314 F.2d 418, 422 (1962), and the cases in the footnote are to the same effect.* No contrary authority which would support the decision below in this case has been found.

This Court indicated in Gangemi v. General Electric Co., 532 F.2d 861 (1976), that it is in agreement with the

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* Avon Products, Inc. v. International U., U.A.W., Local 710, 386 F.2d 651, 653 n.1 (8th Cir. 1967); Truck Drivers & Helpers Local Union No. 728 v. Georgia Highway Express, Inc., 328 F.2d 93, 97 and n.4 (5th Cir. 1964); Tobacco Workers Int'l Union, Local 317 v. Lorillard Corp., 448 F.2d 949, 958 n.17, 962 (4th Cir. 1971); MacFadden-Bartell Corp. v. Local 1034, 345 F. Supp. 1286, 1289 (S.D.N.Y. 1972).

above authorities. The bargaining agreement in Gangemi provided that disputes involving interpretation and application of the contract could be referred to arbitration "with prior written mutual agreement of the [union] and the Company...." The Court held the clause optional, as arbitration could only be had with both parties' prior written consent (at 863, n.1, 865-866). A second clause in the agreement, dealing with grievances involving disciplinary penalties, stated that such grievances "may be submitted to arbitration by either party...." This provision the Court described (at 866) as a "concededly mandatory arbitration clause." The clause in this case covering all disputes is virtually identical to the latter provision.

The foregoing cases are in furtherance of the Supreme Court's decision in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). In that seminal case, the Court emphasized that it is the national policy to settle labor disputes by arbitration. There is no need, in this case, for extended discussion of that policy. It is clear from the bargaining agreement itself that arbitration was the only available forum and that there is no right whatever to judicial relief.

B.

## The Union Is Bound By The Arbitrator's Award Even If Arbitration Was An Optional Remedy

Even if arbitration was "optional", which we assume arguendo only, the Union cannot be allowed to proceed with this action. The reason is two-fold: the arbitrator's award cannot be impeached because it was based on the bargaining agreement and was confirmed by the lower Court, and the Union is bound in any event by its choice of arbitration.

The Supreme Court held in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960), that a labor arbitrator's award must be confirmed if it draws its "essence" from the bargaining agreement. It is a corollary of that basic rule that if a grievance is submitted to an arbitrator pursuant to a bargaining agreement, a lawsuit involving the same subject must be dismissed. Chambers v. Beaunit Corp., 404 F.2d 128, 131-132 (6th Cir. 1968); see also Columbia Broadcasting System, Inc. v. Radio & Television Broadcast Engineers Local 1212, 33 Labor Cases ¶71,057 (S.D.N.Y. 1957); Reynolds Jamaica Mines v. La Societe Navale Caennaise, 239 F.2d 689,

694 (4th Cir. 1956). Any other result would destroy the vitality of the firm national policy, mentioned earlier, to encourage the settlement of labor disputes by arbitration.

In Chambers v. Beaunit Corp., supra, 404 F.2d 128, the Court applied the foregoing principles in circumstances directly analogous to the present case. The plaintiff in Chambers attempted to maintain a §301 action with respect to the same grievance which an arbitrator had ruled was time-barred, just as Arbitrator Schmertz ruled in this case that the Union did not timely file the grievance which is the subject of this action. The Court held in Chambers, affirming dismissal of the complaint, that "the merits of a dispute subject to an arbitration clause in a collective bargaining agreement is outside the purview of judicial examination or consideraton." "What plaintiff is attempting to do ... is impeach the award of the arbitrator which was entered in accordance with the collective bargaining agreement." (at 131-132)

It was not material in Chambers, and is not material in this case, that the arbitrator rejected the grievance as untimely rather than on the merits. 404 F.2d at 131. Timeliness is of course a question of "procedural" arbitrability. If a labor arbitrator's decision on a question of procedural

arbitrability is based on the collective bargaining agreement, his award cannot be collaterally attacked. John Wiley & Sons v. Livingston, 376 U.S. 543, 557 (1964); Operating Engineers v. Flair Builders, Inc., 406 U.S. 487, 491-492 (1972); Rochester Telephone Corp. v. Communication Workers of America, 340 F.2d 237 (2d Cir. 1965); Carey v. General Electric Co., 315 F.2d 499, 501-504 (2d Cir. 1963), cert. denied, 377 U.S. 908 (1964); N F & M Corp. v. United Steelworkers, 524 F.2d 756, 760 (3d Cir. 1975); Tobacco Workers Int'l Union v. Lorillard Corp., 448 F.2d 949, 953-954 (4th Cir. 1971); Yellow Cab Co. v. Democratic Union Organizing Committee, 398 F.2d 735, 737-738 (7th Cir. 1968), cert. denied, 393 U.S. 1015 (1969); Newspaper Guild v. Philadelphia Newspapers, 87 L.R.R.M. 2670 (E.D.Pa. 1974).

Moreover, it is clear even in the absence of a contractual obligation, that when a party elects arbitration, it is bound by its choice of forum and cannot seek judicial relief. In Boston & Maine Corp. v. Illinois Central R.R. Co., 396 F.2d 425 (2d Cir. 1968), plaintiff commenced an action to collect certain balances allegedly due. As here, the action was held in abeyance pending a federal regulatory agency's consideration of the issues. Thereafter both sides decided

to submit to arbitration. Defendant appealed unsuccessfully to this Court from an order refusing to set aside the arbitration award in favor of plaintiff. Defendant "having submitted the entire controversy ... to the arbitrator ... [was] bound by their decision." (at 426)

Similarly, in Reeves v. Tarvizian, 351 F.2d 889 (1st Cir. 1965), a former employee who had brought suit to recover pension benefits referred his claim to arbitration. The First Circuit, affirming dismissal of the lawsuit, held (at 891-892) that plaintiff "elected to proceed with the arbitration ... [and] is bound by the consequences.... There is no good reason for giving him a double opportunity." See also Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 242, 246 (3d Cir. 1968) (right to litigate waived by submission of claim to Stock Exchange arbitration); Rosen v. Eastern Airlines, Inc., 400 F.2d 462, 464 (5th Cir. 1968), cert. denied, 394 U.S. 959 (1969) (voluntary submission to Adjustment Board); Hornsby v. Dobard, 291 F.2d 483, 487 (5th Cir. 1961) (same); Rossi v. Trans World Airlines, 350 F. Supp. 1263, 1271-1272 (C.D. Calif. 1972); Farris v. Alaska Airlines, Inc., 113 F. Supp. 907, 908-909 (W.D. Wash. 1953).

The binding effect of the Union's choice of

arbitration in this case derives also from the doctrine of res judicata. This Court has held that the doctrine is fully applicable to arbitration awards. Goldstein v. Doft, 353 F.2d 484 (2d Cir. 1965), aff'g 236 F. Supp. 730, 732-733 (S.D.N.Y. 1964), cert. denied, 383 U.S. 960 (1966). This Court has also left no doubt that dismissal of a claim on untimeliness grounds is "on the merits" for res judicata purposes. Miller v. National City Bank of New York, 166 F.2d 723, 725, 727 (2d Cir. 1948).*

The provisions of the bargaining agreement, the conclusive nature of the labor arbitration, the Union's choice of forum and the doctrine of res judicata require the conclusion that there is no legal basis for this lawsuit, and that the order appealed from cannot be allowed to stand.

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* See also Angel v. Bullington, 330 U.S. 183, 190 (1947); Williamson v. Columbia Gas & Electric Corp., 186 F.2d 464, 466-467 (3d Cir. 1950), cert. denied, 341 U.S. 921 (1951); Koblitz v. Baltimore & Ohio R.R. Co., 164 F. Supp. 367, 370 (S.D.N.Y. 1958); Todd Shipyards Corp. v. Industrial U. of Marine & Ship Building Workers, 242 F. Supp. 606, 610-611 (D.N.J. 1965); 2 Freeman, A Treatise on the Law of Judgments §§725, 726 at 1538.

## POINT II

## THE ORDER OF THE LOWER COURT IS AN APPEALABLE ORDER.

Appealability was briefed extensively in response to the Union's motion to dismiss which was referred to this panel after oral argument. We respectfully refer to Appellant's Brief in Opposition to Motion to Dismiss Appeal and repeat only in summary form the reasons why the order is appealable.

### A.

### The Order Is Final Under The Cohen Rule Because It Effectively Determines Collateral Rights Too Important To Be Denied Review

The Court below has circumvented the arbitration award, which it purported to confirm, by permitting the Union to proceed with a lawsuit on the same grievance previously rejected by the arbitrator. The order of the lower Court is in direct contravention of United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), and of the other authorities in Point I of this brief requiring dismissal of this case.

All of the requisites for review which the Supreme Court formulated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546-547 (1949), have been satisfied. The lower

Court's order, unless reversed, will improperly and irrevocably deprive the Company of its bargained-for right to both a speedy and a final disposition via the arbitration process. That right is guaranteed to both labor and management by the national labor policy. It is independent of the merits of the dispute itself, is far too important to be denied review, and would be irreparably lost if review were denied and the Company were required to submit to lengthy and expensive pre-trial and trial proceedings.

Moreover, the lower Court's erroneous interpretation of commonly understood contract language may cause serious harm to the national policy encouraging stability of industrial relations through the use of arbitration. The Supreme Court has emphasized, in an analogous case, that the national labor policy must be taken into account when determining whether orders of the lower courts are "final" for appellate purposes. In Construction Laborers v. Curry, 371 U.S. 542, 548-550 (1963), the Court agreed to review a temporary restraining order because delaying review would have "seriously erode[d] the national labor policy." As here, the order had been issued by a court "finally and erroneously asserting its jurisdiction to deal with a controversy which [was] beyond its power..."

The lower Court's order in this case is obviously

"fundamental to the further conduct of the case." As such, it is also appealable under Gillespie v. U.S. Steel Corp., 379 U.S. 148, 153-154 (1964), and the cases there cited. The Court indicated in Gillespie (at 152-153) and in several other decisions allowing interlocutory appeals, among them Mercantile National Bank v. Langdeau, 371 U.S. 555, 558 (1963), that considerations of judicial economy are of the highest importance. If the order on appeal in this case were denied review, complex and time-consuming pre-trial and trial proceedings would have to be held, and doubtless would be followed by further appeals to this Court by one or both of the parties.

B.

The Order Is Also Appealable Under 28 U.S.C. §1292(a)(1)

The Company's motion to dismiss sought, in effect, a permanent stay of judicial proceedings in view of the arbitration award in the Company's favor. The denial of such a stay is appealable as of right under 28 U.S.C. §1292(a)(1) as the denial of an injunction. Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935); Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449 (1935).

In Standard Chlorine of Delaware, Inc. v. Leonard, 384 F.2d 304, 308 (2d Cir. 1967), this Court adopted a two-pronged test to determine the applicability of Enelow: (1) the stay

must be to permit prior determination of an equitable defense, and (2) the action to be stayed must be one at law rather than in equity. Both branches of the test are satisfied in the present case.

First, the Company's motion based on the arbitration agreement and award was the assertion of an equitable defense within the meaning of Enelow. Shanferoke Coal, supra, 293 U.S. at 452; Council of Western Elec. Tech. Emp. v. Western Electric Co., 238 F.2d 892 (2d Cir. 1956). Appealability is not affected by the fact that arbitration had been concluded when the stay was sought. A stay pending arbitration may be sought and granted even after arbitration is barred, as here, by a contractual time limitation. Matter of River Brand Rice Mills, Inc. v. Latrobe Brewing Co., 305 N.Y. 36, 41 (1953).

Second, the Union's lawsuit which the Company sought to stay, was one at law. Aside from a status quo order, the only relief other than arbitration which the Union even arguably sought was money damages for employees not assigned to the work in question. On its face, the Union's suit, to the extent it sought any permanent judicial relief, was for damages for breach of contract, traditionally an action of law. See Council of Western Elec. Tech. Emp., supra; American Safety Equipment Corp. v. J.P. Maguire & Co.,

391 F.2d 821, 824 (2d Cir. 1968); Korody Marine Corp. v. Minerals & Chemicals Philipp Corp., 300 F.2d 124 (2d Cir. 1962); Signal-Stat Corp. v. Local 475 (UE), 235 F.2d 298, 300-301 (2d Cir. 1956), cert. denied, 354 U.S. 911 (1957).

The order below is a final order under Cohen and is also appealable as the denial of an injunction. If there is question, however, as to the appealability of the order, the Court should grant the Company's application for a writ of mandamus.

## POINT III

### A WRIT OF MANDAMUS SHOULD ISSUE IF THE ORDER IS NOT APPEALABLE.

We need not repeat the arguments made earlier in this brief that the order of the lower Court has no legal basis, that it violates the national labor policy, and that it will encourage improper recourse to the federal courts if allowed to stand. It is clear from the prior decisions of the Supreme Court that in such circumstances mandamus is the proper remedy.

In LaBuy v. Howes Leather Co., 352 U.S. 249, 257-260 (1957), the Court stressed the need to exercise supervisory powers over the District Courts, and held that mandamus was appropriate to correct a "clear abuse of discretion or

usurpation of judicial power." Surely the attempt to force a party to defend an action when the same dispute has been decided by a labor arbitrator is such a usurpation.

Again in Schlagenhauf v. Holder, 379 U.S. 104, 111 (1964), the Court held that mandamus was the proper remedy to review challenged authority of a trial judge. The Court held the writ was appropriate in view of petitioner's allegation that the judge had no authority to order a mental and physical examination, and also "to avoid piecemeal litigation and to settle new and important problems." (at 111) In Will v. United States, 389 U.S. 90, 107 (1967), the Court cited its decisions in LaBuy and Schlagenhauf and indicated that mandamus "serves a vital corrective and didactic function."

The Supreme Court recently held in Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1967), that mandamus is available to correct the improper remand of a case:

> "A 'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' [citations omitted]" (at 352)

The writ should have issued in Thermtron, Mr. Justice White wrote for the Court, "to prevent nullification of the removal statutes by remand orders resting on grounds having no warrant in the law." (at 353)

The Court held in Thermtron (at 352) that "the writ of mandamus is an appropriate remedy to require the District Court to entertain [an] ... action." The writ is also available to require a court to refuse to do so. In Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80 (2d Cir. 1961), cert. denied, 368 U.S. 986 (1962), the lower Court ordered the trial of an issue of contract fraud "that ha[d] been conclusively determined" in another court, just as the Court in this case has ordered a trial of the Union's grievance although it has been conclusively determined in the arbitration forum.

In granting mandamus to foreclose retrial of the issue in Lummus (at 87),Judge Friendly wrote that "the right not to have to relitigate an issue [conclusively] determined is as much entitled to extraordinary protection as the right to jury trial ... [or] the right to trial before an unbiased judge .... Accordingly we think the case appropriate for mandamus ...."

This case has been conclusively determined by the arbitrator. The Company's right not to have to defend it again is at least as important as the right held in Lummus to be entitled to extraordinary protection.

## CONCLUSION

The order appealed from should be reversed, or a writ of mandamus directing the District Judge to vacate the order should be issued.

Respectfully submitted,

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November 22, 1976

# ADDENDUM

## Article XV - Grievance Procedure

15.01 The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract, and no other matters shall be subject to arbitration.

In the adjustment of such matters, the Union shall be represented in the first instance by the duly designated Committee and the Shop Chairman and the Employer shall be represented by the Shop Management. It is agreed that in the handling of grievances, there shall be no interferences with the conduct of the business.

15.02 If the Committee and the Shop Management are unable to effect an adjustment, then the issue involved shall be submitted in writing by the party claiming to be aggrieved, to the other party. The matter shall then be taken up for the adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, then either party shall have the right to refer the matter to arbitration as herein provided. Arbitration must be resolved ninety (90) days after the occurrance of the event or ninety (90) days after the Union should have had knowledge of the event.

## Article XVI - Arbitration

16.01 The parties may submit to arbitration in accordance with the rules of the American Arbitration Association upon written request of either party, provided, however, that by mutual agreement the parties may agree to the selection of an arbitrator through other than the regular American Arbitration Association selection process.

16.02 The Arbitrator shall consider each case solely on its merits and this Agreement shall constitute the basis upon which the decision shall be rendered. The Arbitrator shall have no power to alter, amend, revoke or suspend any of the provisions of this Agreement.

16.03 The decision of the Arbitrator shall be binding upon both parties for the duration of this Agreement.

16.04 Should any party fail, upon written notice, to appear before the Arbitrator in any matter submitted for arbitration as herein provided, the Arbitrator may proceed with the hearing, and render his decision upon the testimony and evidence presented, which decision shall be binding and shall have the same force and effect as if both parties were present.

16.05 The Arbitrator's decision shall be based only on evidence presented to him in the presence of both parties or otherwise made available to both parties.

Rec'd - K.H. Hagopian
11/22/76 - 1:05 P.M.

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